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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

161-446

No. 567.

DAN K. SWEARINGEN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED MARCH 22, 1895.

(15,840.)

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1 Pleas and proceedings in the district court of the United States for the district of Kansas, third division, sitting at the city of Fort Scott, Kansas.

Be it remembered that heretofore, to wit, on the 12th day of November, A. D. 1894, the said defendant hereinafter named then being in custody, an indictment was found by the grand jury and filed in said court; and the said indictment is in words and figures as follows, to wit:

2 THE UNITED STATES OF AMERICA, } ss:
District of Kansas, }

In the District Court of the said United States in and for the Third Division of the said District, November Term, 1894.

THE UNITED STATES OF AMERICA } Indictment for Violation of
vs. } Section 3893, Revised Statutes of the United States.
DAN K. SWEARINGEN (Whose More Full Christian Name is Unknown). }

At the term of the district court of the United States of America in and for the third division of said district of Kansas, begun and held at Fort Scott, in the third division of said district, on the fifth day of November, in the year of our Lord one thousand eight hundred and ninety-four, the grand jurors of the United States of America, duly impaneled, sworn, and charged to inquire of offenses committed within the third division of the district of Kansas, upon their oaths do find and present that Dan K. Swearingen (whose more full Christian name is to the grand jurors aforesaid unknown), late of the third division of the district of Kansas aforesaid, on or about the 21st day of September, in the year of our Lord one thousand eight hundred and ninety-four, at the first division of the district of Kansas aforesaid and within the jurisdiction of this
3 court, unlawfully and knowingly a certain publication entitled "The Burlington Courier," volume four, number thirty-nine, published at Burlington, Coffey county, Kansas, Friday, September 21st, 1894, said publication containing an article of an obscene, lewd, and lascivious nature, did deposit for mailing and delivery to B. Riggs at Burlington, Kansas; which said publication so as aforesaid containing said obscene, lewd, and lascivious article was by the said Dan K. Swearingen knowingly deposited in the post office of the United States at Burlington, within said third division of the district of Kansas, to be conveyed by mail and by the use of said post office and its officers to said B. Riggs at Burlington, Kansas; and said obscene, lewd, and lascivious article is contained on the second line of the third page of said publication and begins with the words "Editorial brevities. About the meanest" and ending with the words "and henceforth are done;" and said obscene, lewd, and lascivious article so contained in said pub-

lication as aforesaid is of a nature so obscene, lewd, and lascivious as to dispense with the incorporation of the words and figures in this indictment, he, the said Dan K. Swearingen, then and there well knowing that said obscene, lewd, and lascivious article so contained in said publication as aforesaid was non-mailable matter, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

4 *2d Count.*

And the grand jurors aforesaid upon their oaths aforesaid do further find and present that Dan K. Swearingen (whose more full Christian *mane* is to the grand jurors aforesaid unknown), late of the third division of the district of Kansas aforesaid, on or about the 21st day of September, in the year of our Lord one thousand eight hundred and ninety-four, at the district of Kansas aforesaid and within the jurisdiction of this court, unlawfully and knowingly a certain publication entitled "The Burlington Courier," volume four, number thirty-nine, published at Burlington, Coffey county, Kansas, Friday, September 21st, 1894, said publication containing an article of an obscene, lewd, and lascivious nature, did deposit for mailing and delivery to H. E. Cowgill at Burlington, Kansas; which said publication so as aforesaid containing said obscene, lewd, and lascivious article was by the said Dan K. Swearingen knowingly deposited in the post office of the United States at Burlington, within said third division of the district of Kansas, to be conveyed by mail and by the use of said post office and its officers to said H. E. Cowgill at Burlington, Kansas; and said obscene, lewd, and lascivious article is contained on the second line of the third page of said publication and begins with the words "Editorial brevities. About the meanest" and ending with the words "and henceforth are done;" and said obscene, lewd, and lascivious article so contained in said publication as aforesaid is of a nature so obscene, lewd, and lascivious as to dispense with the incorporation of the words and figures in this indictment, he, the said Dan K. Swearingen, then and there well knowing that said obscene, lewd, and lascivious article so contained in said publication as aforesaid was non-mailable matter, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

5 *3d Count.*

And the grand jurors aforesaid upon their oaths aforesaid do further find and present that Dan K. Swearingen (whose more full Christian *mane* is to the grand jurors aforesaid unknown), late of the third division of the district of Kansas aforesaid, on or about the 21st day of September, in the year of our Lord one thousand eight hundred and ninety-four, at the district of Kansas aforesaid and within the jurisdiction of this court, unlawfully and knowingly a certain publication entitled "The Burlington Courier," volume

four, number thirty-nine, published at Burlington, Coffey county, Kansas, Friday, September 21st, 1894, said publication containing an article of an obscene, lewd, and lascivious nature, did deposit for mailing and delivery to J. M. Lane at Burlington, Kansas; which said publication so as aforesaid containing said obscene, lewd, and lascivious article was by the said Dan K. Swearingen knowingly deposited in the post office of the United States at Burlington, within said third division of the district of Kansas, to be conveyed by mail and by the use of said post office and its officers to said J. M. Lane at Burlington, Kansas; and said obscene, lewd, and lascivious article is contained on the second line of the third page of said publication and begins with the words "Editorial brevities. About the meanest" and ending with the words "and henceforth are done;" and said obscene, lewd, and lascivious article so contained in said publication as aforesaid is of a nature so obscene, lewd, and lascivious as to dispense with the incorporation of the words and figures in this indictment, he, the said Dan K. Swearingen, then and there well knowing that said obscene, lewd, and lascivious article so contained in said publication as aforesaid was non-mailable matter, contrary to the form of the statute in such case made and provided and against the peace and dignity
6 of the United States of America.

RANKIN MASON,
Assistant United States Attorney.

7 [Endorsed:] 300. No. 66. United States district court, third division. The United States *vs.* Dan K. Swearingen. Depositing obscene publication in mails of U. S. A true bill. E. C. Weiler, foreman. Witnesses: J. E. Watrous, B. Riggs, H. E. Cowgill, J. M. Lane, John Redmond, Rob't Gawthrope, Burlington, Ks. Filed Nov. 12th, 1894. Geo. F. Sharitt, clerk.

8 In the District Court of the United States, District of Kansas, Third Division.

THE UNITED STATES
vs.
DAN K. SWEARINGEN.

Motion to Quash Indictment.

Now comes the said defendant and moves the court to quash the indictment heretofore found against him and each and every count therein and alleges as grounds therefor—

1. That said indictment does not state or charge a public offense.
2. That several offenses are improperly joined.

Wherefore he prays the consideration of the court in the premises and that he be discharged.

J. D. McCLEVERTY,
Defendant's Attorney.

It is agreed that the printed clipping hereto attached, marked "A," is the newspaper article referred to and mentioned in the indictment herein and may be used for the purpose of hearing the motion to quash the indictment.

W. C. PERRY, *U. S. Att'y.*
J. D. McCLEVERTY,
Def't's Attorney.

9 "A."

Editorial Brevities.

About the meanest and most universally hated and detested thing in human shape that ever cursed this community is the red-headed mental and physical bastard that flings filth under another man's name down on Neosho street. He has slandered and maligned every Populist in the State, from the governor down to the humblest voter. This black-hearted coward is known to every decent man, woman, and child in the community as a liar, perjurer, and slanderer, who would sell a mother's honor with less hesitancy and for much less silver than Judas betrayed the Saviour, and who would pimp and fatten on a sister's shame with as much unction as a buzzard gluts in carr-on. He is a contemptible scoundrel and political black-leg of the lowest cut. He is pretending to "A." serve Democracy and is at the same time in the pay of the Republican party. He has been known as the companion of negro strumpets and has reveled in lowest debauches. He has criminally libelled and slandered such men as General Kelley, W. T. Tipton, Judge Stoeltzing, Senator Leedy, Rev. Britton, and dozens of others whom we might name, who are recognized by all parties as among the oldest and most-respected citizens of the county. His soul, if he has a soul, is blacker than the blackest shades of hell. He is the embodiment of treachery, cowardice, and dishonor and hasn't the physical nor moral courage to deny it. He stands today hated, despised, and detested as all that is low, mean, debased, and despisable. We propose to have done with the knave. We have already devoted too much valuable space to him. Time and again has he been proven a wilful, malicious, and cowardly liar, and instead of subsiding he has redoubled his lies. He lies faster than ten men could refute; and for what? A little 10 Republican slush-money! He is lower, meaner, filthier, rottener than the rottenest strumpet that prowls the streets by night. Again we say, we are done with him. The sooner Populists and Populist newspapers snub him, quit him cold, ignore him entirely, the sooner will he cease to be thought of only as a pimp that any man can buy for $1 or less. He is too little and rotten to merit the notice of men. We have been wrong in noticing the paltroon at all, and henceforth are done.

11 Endorsed: # 66. The United States *vs.* Dan K. Swearingen. Motion to quash indictment. Filed Jan'y 3, 1895. Geo. F. Sharitt, clerk, by S. P. Mosher, dep.

12 UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

At a term of the district court of the United States of America for the district of Kansas begun and held at the city of Fort Scott, in said district, on Monday, the fifth day of November, 1894, proceedings were had and appear of record in words and figures following, to wit:

THE UNITED STATES *vs.* DAN K. SWEARINGEN. } No. 66. Indicted for Depositing Obscene Publication in Mails of U. S.

FRIDAY, *January 4th*, 1895.

This cause came on for hearing upon the motion of defendant to quash the indictment in this cause, the defendant appearing by J. D. McCleverty, Esq., his attorney, and the plaintiff by W. C. Perry, Esq., U. S. attorney; and the court, being duly advised in the premises, doth overrule and deny said motion and doth order that this cause stand for trial; to which ruling of the court the defendant duly excepted and excepts.

13 UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

At a term of the district court of the United States of America for the district of Kansas begun and held at the city of Fort Scott, in said district, on Monday, the fifth day of November, 1894, proceedings were had and appear of record in words and figures following, to wit:

THE UNITED STATES *vs.* DAN K. SWEARINGEN. } No. 66. Indicted for Depositing Obscene Publication in Mails of U. S.

SATURDAY, *January 12th*, 1895.

Comes now W. C. Perry, Esq., United States attorney, who prosecutes in this behalf, and moves the court for the arraignment of the defendant upon the indictment herein, the defendant, Dan K. Swearingen, appearing in his own proper person and by J. D. McCleverty, Esq., his attorney. Thereupon the defendant, Dan K. Swearingen, was formally arraigned upon the charge of depositing obscene publication in the mails of the United States, as contained in the indictment herein, and for plea thereto said defendant doth say that he is not guilty. Thereupon came a jury of twelve good and lawful men of this district, to wit, B. F. Devore, Geo. W. Wise, W. T. McMakin, Adem Brenner, W. P. Jacoby, J. G. Reese, R. R. Roberts, W. J. Bound, Frank Bacon, John B. Lyon, T. P. Fletcher, and A. J. Jackson, who were duly empaneled, examined by the court and by the attorneys for plaintiff and defendant, and accepted and duly sworn to try this cause and a true verdict render according to the law and the evidence, and the trial hereof proceeded; and the jury, having heard all the evidence introduced, the arguments

of counsel, and the instructions of the court, retire to their jury-room in charge of a sworn bailiff, to consider of their verdict.

14 And the jury, having agreed upon their verdict, return again into court with their verdict in writing; which verdict is in the words and figures as follows, to wit:

"In the District Court of the United States for the District of Kansas, Third Division.

UNITED STATES
vs.
DAN K. SWEARINGEN. } No. 66.

We, the jury in the above-entitled cause, duly empaneled and sworn, upon our oaths find the defendant, Dan K. Swearingen, guilty as charged in the indictment.

FRANK BACON, *Foreman.*"

Thereupon the defendant filed his motion in arrest of judgment and a motion for a new trial, both being argued together by consent of the parties hereto; and the court, being well advised in the premises, doth overrule and deny said motions; to which rulings of the court defendant duly excepted and excepts. Thereupon, on motion of W. C. Perry, U. S. attorney, for judgment and sentence against the defendant, the court, after informing the defendant of the verdict of the jury, inquired of him if he had any legal cause to show why judgment and sentence of the court should not now be pronounced against him, and no cause being shown by the defendant or his attorney and none appearing to the court—

It is thereupon by the court now here considered, ordered, and adjudged that said defendant, Dan K. Swearingen, be imprisoned at hard labor in the penitentiary of the State of Kansas, at Lansing, Kas., for a period of one year, and that he make his fine unto the United States in the sum of $50 and pay the costs of this prosecution, and that execution issue for said fine and costs.

15 To which judgment and sentence the defendant duly excepted and excepts.

It is further ordered by the court that said judgment and sentence be, and hereby is, suspended until the first day of the regular May, 1895, term of this court, and that defendant enter into a bond of $500 for his appearance at said first day of said term.

16 In the District Court of the United States, District of Kansas, Third Division.

THE UNITED STATES
vs.
DAN K. SWEARINGEN.

Motion in Arrest of Judgment.

Now comes the said defendant, after a verdict and before judgment and sentence, and moves the court that judgment and sentence herein may be arrested, and states as the grounds of said motion:

1. That the indictment herein does not charge a public offense, nor did the evidence as given on the trial prove a public offense.
2. That the indictment sets forth a misjoinder of offenses.
3. And for further manifest defects in the record.

Hence defendant prays that he be discharged.

J. D. McCLEVERTY,
Defendant's Attorney.

Endorsed: #66. The United States *vs.* Dan K. Swearingen. Motion in arrest of judgment. Filed Jan'y 11th, 1895. Geo. F. Sharitt, clerk, by S. P. Mosher, dep.

17 In the District Court of the United States, District of Kansas, Third Division.

THE UNITED STATES
vs.
DAN K. SWEARINGEN.

Motion for New Trial.

Now comes the said defendant and moves the court to set aside the verdict of the jury heretofore rendered herein and grant a new trial of this action, and assigns the following grounds therefor:

1. That the said verdict is contrary to law and is not sustained by sufficient evidence as to either the second or third counts of the indictment.
2. That the said verdict is contrary to law and is not sustained by sufficient evidence as — either of the counts of the indictment.
3. For error of law occurring at the trial and excepted to by the defendant at the time.
4. That the indictment does not charge a public offence.
4. That said indictment sets forth and contains a misjoinder of offences.

J. D. McCLEVERTY,
Att'y for Def't.

Endorsed: #66. The United States *vs.* Dan K. Swearingen. Motion for new trial. Filed Jan'y 11th, 1895. Geo. F. Sharitt, clerk, by S. P. Mosher, dep.

18 UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

At a term of the district court of the United States of America for the district of Kansas begun and held at the city of Fort Scott, in said district, on Monday, the fifth day of November, 1894, proceedings were had and appear of record in words and figures following, to wit:

THE UNITED STATES OF AMERICA
vs.
DAN K. SWEARINGEN.

SATURDAY, *January 12th*, 1895.

Now, at this day, comes the said Dan K. Swearingen and presents his bill of exceptions herein, and upon his motion the same is settled and allowed, and it is ordered to be filed and made a part of the record herein.

19 In the United States District Court for the District of Kansas, Third Division.

THE UNITED STATES OF AMERICA
vs.
DAN K. SWEARINGEN.

Error from the district court of the United States for the district of Kansas, third division.

Now, on this day, comes the said Dan K. Swearingen, above named, and files his assignment of error and petition for a writ of error to the Supreme Court of the United States from the verdict and judgment rendered in said district court on the 11th day of January, A. D. 1895; whereupon it is ordered that said writ of error be allowed as prayed for and supersedeas and suspension of the execution of said judgment upon the filing of a bond in the sum of five hundred dollars, conditioned for the appearance of said defendant at the next term of this court if the proceedings in error be not perfected, and if such proceedings be perfected, then to abide the further order of this court if said judgment be affirmed, such bond to be filed within sixty days from said 11th day of January, 1895.

The clerk of said district is ordered to prepare and forward a proper transcript, to be lodged in said Supreme Court of the United States, at the expense of the United States.

JNO. A. WILLIAMS,
U. S. Dist. Judge.

20 Issuance and service of citation in error herein is waived and the appearance of the United States in said circuit court of appeal is hereby entered this 19 day of January, A. D. 1895.

W. C. PERRY,
U. S. Att'y, Dist. of Kansas.

Endorsed: No. —. The United States of America, plaintiff, *vs.* Dan K. Swearingen, defendant. Filed 12th day of Jan., 1895. Geo. F. Sharitt, clerk, by S. P. Mosher, dep. A. 77.

21 In the District Court of the United States, District of Kansas, Third Division.

THE UNITED STATES OF AMERICA
vs.
DAN K. SWEARINGEN.

Petition for Writ of Error.

Your petitioner, the said defendant above named, respectfully represents to this honorable court that in said case, lately pending in said court, a verdict and judgment of conviction *was* rendered against him, very greatly to his prejudice and injury, and which said verdict and judgment *is* erroneous and *in*just in many particulars; that he desires to institute and prosecute proceedings seeking to reverse and correct the manifold errors committed in the proceedings and trial of said cause.

Wherefore, in order that your petitioner may obtain relief in the premises and have opportunity of showing errors complained of, he prays that he may be granted and allowed a writ of error in this case to the Supreme Court of the United States upon such terms as may be proper.

J. D. McCLEVERTY,
Attorney for Defendant.

Endorsed: No. 66. The United States of America, plaintiff, *vs.* Dan K. Swearingen, defendant. Petition for writ of error. Filed 12th day of Jan'y, 1895. Geo. F. Sharitt, clerk, by S. P. Mosher, dep.

22 In the District Court of the United States for the District of Kansas, Third Division.

THE UNITED STATES OF AMERICA
vs.
DAN K. SWEARINGEN.

Assignment of Errors.

Now comes the said defendant above named and says that there is manifest error in the record and proceedings in this case in this, to wit:

1. That said court erred in overruling and denying this defendant's motion to quash and set aside the indictment herein upon the grounds therein alleged, that no public offense was charged in said indictment.

2. That this court erred in overruling and denying this defendant's motion to quash said indictment upon the ground alleged in said motion, of a misjoinder of offenses.

3. That said court erred in overruling this defendant's objection to the admission of any evidence under said indictment.

4. That said court erred in admitting the newspaper article in evidence which is referred to in the indictment.

5. That said court erred in refusing to strike out the evidence, as moved for by the defendant on the trial.

6. That said court erred in overruling the motion of defendant to compel the district attorney to elect upon which count of the indictment he would rely under the evidence given in the support of the indictment.

7. That said court erred in the instructions given to the jury, in charging that the newspaper article introduced in evidence was within the statute prohibiting the mailing of certain matters
23 in the mails of the United States.

8. For error of law occurring during the trial and excepted to by the defendant at the time.

Wherefore, because of said errors, the said defendant prays that the said verdict and judgment of said district court be reversed, and that this defendant be restored to all things lost thereby.

J. D. McCLEVERTY,
Defendant's Attorney.

Endorsed: No. 66. The United States of America, plaintiff, *vs.* Dan K. Swearingen, defendant. Assignment of errors. Filed 12 day of Jan'y, 1895. Geo. F. Sharitt, clerk, by S. P. Mosher, dep.

24 In the District Court of the United States, District of Kansas, Third Division.

THE UNITED STATES
vs.
DAN K. SWEARINGEN.

Bill of Exceptions.

Now, on this 11th day of January, A. D. 1895, at the regular November term of this court, this cause came on for trial before the court and a jury, and the jury having been duly empanelled and sworn to try the issues herein joined, the Government, to maintain the issues upon its part, offered in evidence a newspaper named the Burlington Courrier for the purpose of proving the article mentioned and described in the indictment herein.

Thereupon the defendant, in open court, admitted that during September, 1894, and for some time prior thereto, he was the editor and publisher of the Burlington Courrier, the newspaper mentioned in the indictment herein, and was such on the 21st day of September, 1894. The Government then offered the article in evidence, and defendant objected for the reason that no public offense was stated in the indictment, and that there was a misjoinder of offense therein, and that the words of said newspaper article did not constitute unmailable matter; which objection was by the court overruled; to which ruling the defendant excepted. Said newspaper article was then read in evidence to the jury and is as follows:

25 *Editorial Brevities.*

About the meanest and most universally hated and detested thing in human shape that ever cursed this community is the red-headed mental and physical bastard that flings filth under another man's name down on Neosho street. He has slandered and maligned every Populist in the State, from the governor down to the humblest voter. This black-hearted coward is known to every decent man, woman, and child in the community as a liar, perjurer, and slanderer, who would sell a mother's honor with less hesitancy and for much less silver than Judas betrayed the Saviour, and who would pimp and fatten on a sister's shame with as much unction as a buzzard gluts in carr-on. He is a contemptible scoundrel and political black-leg of the lowest cut. He is pretending to serve Democracy and is at the same time in the pay of the Republican party. He has been known as the companion of negro strumpets and has reveled in lowest debauches. He has criminally libelled and slandered such men as General Kelley, W. T. Tipton, Judge Stoeltzing, Senator Leedy, Rev. Britton, and dozens of others whom we might name, who are recognized by all parties as among the oldest and most-respected citizens of the county. His soul, if he has a soul, is blacker than the blackest shades of hell. He is the embodiment of treachery, cowardice, and dishonor and hasn't the physical nor moral courage to deny it. He stands today hated, despised, and detested as all that is low, mean, debased, and despisable. We propose to have done with the knave. We have already devoted too much valuable space to him. Time and again has he been proven a wilful, malicious, and cowardly liar, and instead of subsiding he has redoubled his lies. He lies faster than ten men could refute; and for what? A little
26 Republican slush-money! He is lower, meaner, filthier, rottener than the rottenest strumpet that prowls the streets by night. Again we say, we are done with him. The sooner Populists and Populist newspapers snub him, quit him cold, ignore him entirely, the sooner will he cease to be thought of only as a pimp that any man can buy for $1 or less. He is too little and rotten to merit the notice of men. We have been wrong in noticing the paltroon at all, and henceforth are done.

27 CHARLES DECKER, being duly sworn as a witness on behalf of the Government, testified as follows:

I lived at Burlington, Kansas, during September last and worked on the Burlington Courrier at Burlington, Kansas. Defendant ran the office. I was a printer and did general work. Two other printers, one McCorkle and another, also worked there. I attended to mailing the newspapers, and the defendant and McCorkle did also. This issue, so far as I recollect — that is, the issue of September 21st, 1894 — was mailed the same as other issues. McCorkle sometimes mailed as well as I. The defendant, Swearingen, was the boss of the office. He hired and paid the rest of us who worked there. The paper was

mailed at the post office at Burlington, Kansas; can't say as to any individual paper. My recollection is that B. Riggs and H. E. Cowgill were regular subscribers to the paper and their names were on the mail-list. I do not — that J. M. Lane was on the mail-list; can't say as to the day this issue was made; can't say that I mailed any paper addressed to either of said parties. Probably 700 or 800 subscribers were on the mailing-list. In mailing papers I and the other employees acted under instructions of the defendant.

On cross-examination he testified: Sometimes people called at the printing office and got their papers and didn't get it then through the post office; can't say whether Riggs, Cowgill, and Lane got theirs at the printing office that week or not.

W. T. TIPTON, being duly sworn as a witness on behalf of the Government, testified as follows:

I live at Burlington, Kansas, and did in September last. I know the defendant, Swearingen, and have known him for several years. He was in the newspaper business at Burlington, Kansas. He published the Courrier. I didn't see this article in manuscript;
28 saw a part of it in type before it was printed, and the defendant read it, or a part of it, to me, and he told me that he had prepared an article that he wished to read to me. I think it was not all completed. He read a part of it to me and asked me what I thought of it. I said I thought it would do our ticket more harm than good, and that if I were him I wouldn't publish it. Nothing was said about its being unlawful. We didn't consider it unlawful.

GRANT RIGGS, being duly sworn as a witness on behalf of the Government, testified as follows:

I live at Burlington, Kansas, and did during September last. I know the defendant and this paper. I got this paper of September 21st, addressed to B. Riggs, at the post office at Burlington, Kansas, soon after its date. We had a box at the post office at Burlington, Kansas, and I got this issue of this paper out of that box, the same as I did other mail.

On cross-examination he testified: Can't say what day I got this paper, whether it was Friday or Saturday. I know I got a copy of this paper which was addressed to B. Riggs. B. Riggs is my sister-in-law. She took the paper. I know I got it out of the post office at or about the date of issue.

J. M. LANE, being duly sworn as a witness on behalf of the Government, testified as follows:

I live at Burlington, Kansas, and have for several years. I have known the defendant, Swearingen, probably fifteen years. I was not a subscriber for this paper. The firm of Lane & Kent were subscribers for the paper. I was a member of the firm of Lane & Kent. I first saw this paper of September 21st, 1894, in our office. The one I saw was addressed to Lane & Kent. It was brought into the office by a boy, the son of my partner, Mr. Kent. It was
29 along with other mail. I did not get it myself. I do not know of my own knowledge that it came through the post

office. I do not know whether the boy went to the printing office and got it. I only know he brought it into our office along with other mail. By "our office" I mean the business office of Lane & Kent at Burlington.

CHARLES DECKER, being recalled by the Government for further examination, testified:

I know this boy, the son of Mr. Kent of the firm of Lane & Kent. He frequently came to the printing office and got their paper; can't say whether he got the paper of Lane & Kent at the printing office that day or not. I do not recollect.

Defendant here moved to strike out the evidence of J. M. Lane and all evidence with reference to the mailing of any paper to J. M. Lane or to H. E. Cowgill; which motion was by the court overruled, and the defendant excepted.

JOHN REDMOND, being duly sworn as a witness on behalf of the Government, testified as follows:

I live at Burlington, Kansas, and have for some time. I sometimes wrote articles for this paper, the Burlington Courrier, and did so at the instance of the defendant. He said to me several times that if I heard anything of any importance that he would be glad to have me write it up, and I sometimes did so. I remember this article in evidence here. The first I saw of it was Thursday evening, the evening before the date of publication of the paper. I was in the lodge-room over the printing office, and when I was through there I stopped at the printing office and got the paper.

On cross-examination he testified: I am not sure upon what day this paper was completed. The copy which I got on Thursday evening was not fully printed. I judge that it must have been finished on the next day; but I can't say positively whether it was or not. I know that sometimes the paper was not issued until the day after its date.

M. M. BOWMAN, being duly sworn as a witness on behalf of the Government, testified as follows:

I own the plant of this newspaper. I leased it during last year to this defendant for so much money rent. I had no control over it in September last. It was entirely controlled by the defendant. I had no interest in it, except that I had leased it to him. I can't say when this paper was issued.

On cross-examination he testified: He was absent from Burlington from Tuesday of that week until Friday night and do not know what occurred while I was absent.

Thereupon the Government rested.

The defendant offered no evidence whatever, but moved the court to compel the district attorney to elect upon which count of the indictment he would rely, upon the ground that there was nothing to show but that all of these newspapers, if any, were mailed at one time, thus constituting but one transaction and but one offence, if

any offence were committed; also to strike out all evidence as to the mailing of any paper to H. E. Cowgill or J. M. Lane; which motions were by the court overruled, and the defendant excepted.

Thereupon the court instructed the jury as follows:

"GENTLEMEN OF THE JURY: The newspaper article in evidence here, which the defendant admits he published, is obscene
31 and unmailable matter, and the only thing for you to pass upon is whether the evidence satisfies you beyond a reasonable doubt that the defendant deposited, or caused it to be deposited, in the post office at Burlington, Kansas, one or more copies of the newspaper containing this article, as charged in the indictment. The question of time is of no importance, except that it was done within three years of the finding of this indictment, which was in November, 1894. If you do so find, then the defendant would be guilty. A reasonable doubt is not a mere suppositi-ous doubt, but one based upon the evidence, and such as a reasonable man would act upon in the most important affairs of life. You are the exclusive judges of the evidence and of the credibility of all the witnesses and evidence." To the giving of which instruction the defendant duly excepted.

Now, inasmuch as the above and foregoing matters and things do not appear of record, the defendant presents this as his bill of exceptions and prayed that it may be settled, signed, and allowed as such, which is accordingly done, and upon his motion it is ordered to be made a part of the record in this case.

JNO. A. WILLIAMS,
U. S. Dist. Judge.

Endorsed: No. 66. The United States of America, plaintiff, *vs.* Dan K. Swearingen, defendant. Bill of exceptions. Filed 12 day of January, 1895.

GEO. F. SHARITT, *Clerk*,
By S. P. MOSHER, *Dep.*

32 UNITED STATES OF AMERICA, } *ss:*
District of Kansas, }

Know all men by these presents that Dan K. Swearingen, as principal, and Chas. Kahnt and H. E. Cowgill, as sureties, are held and firmly bound unto the United States of America in the sum of five hundred dollars; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators.

The condition of the above bond is that whereas one Dan K. Swearingen was, at the November term, A. D. 1894, of the United States district court of Kansas, third division, indicted for depositing obscene and unmailable matter in the United States mails, and on trial on said indictment was convicted thereof and sentenced to pay a fine of fifty dollars and one year's confinement in the penitentiary at Lansing, Kansas, and he desires to effect proceedings in error herein and stay proceedings in said district court:

Now, therefore, if the said Dan K. Swearingen shall be and appear

in his own proper person in the district court of the United States for the district of Kansas, third division, to be holden in the city of Fort Scott, in said district, on the first day of the next term thereof, if no proceedings in error herein be taken, and abide the further order of said court if such proceedings in error be taken and said judgment be affirmed, then this bond shall be null and void; otherwise to remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 12th day of January, A. D. 1895.

DAN K. SWEARINGEN.
CHAS. KAHNT.
H. E. COWGILL.

Approved Jan'y 19th, 1895.

GEO. F. SHARITT, *Clerk*,
By S. P. MOSHER, *Dep.*

CHAS. KAHNT AND
H. E. COWGILL.

33 Signed in the presence of and acknowledged before me this the 14th day of January, A. D. 1895.

[SEAL.] WM. H. RUDRAUFF,
Notary Public.

My com. expires July 22, 1897.
Approved —— —, 189–.

——— ———,
United States Marshal,
By —— ——, *Deputy*.

UNITED STATES OF AMERICA, } ss:
District of Kansas, }

I, the undersigned, surety on the within undertaking, do solemnly swear that I am a resident of the State of Kansas, and that I am worth 500.00 dollars over and above all exemptions, debts, and liabilities, consisting of stock in business, so help me God.

CHAS. KAHNT.

Subscribed and sworn to before me this 14th day of January, A. D. 1895.

[SEAL.] WM. H. RUDRAUFF,
Notary Public.

Com. expires July 22, 1897.

34 UNITED STATES OF AMERICA, } ss:
District of Kansas, }

I, the undersigned, surety on the within undertaking, do solemnly swear that I am a resident of the State of Kansas, and that I am worth 500.00 dollars over and above all exemptions, debts, and liabilities, consisting of stock in business, so help me God.

H. E. COWGILL.

Subscribed and sworn to before me this 14th day of January, A. D. 1895.

[SEAL.] WM. H. RUDRAUFF,
Notary Public.

Com. expires July 22, 1897.

Endorsed: No. 66. U. S. *vs.* Dan K. Swearingen. Bond. Filed Jan'y 19th, 1895. Geo. F. Sharitt, clerk, by S. P. Mosher, dep.

35 UNITED STATES OF AMERICA, } *ss:*
District of Kansas, }

I, Geo. F. Sharitt, clerk of the district court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct copy of record and proceedings in said court in the case of The United States *vs.* Dan K. Swearingen, No. 66 (3d division).

Seal of District Court U.S., District of Kansas, 1861.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Topeka, in said district of Kansas, this 21st day of February, A. D. 1895.

GEO. F. SHARITT, *Clerk.*

36 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court of the United States for the third division of the judicial district of Kansas, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, at the November term, 1894, thereof, between The United States of America as plaintiff and Dan K. Swearingen as defendant, a manifest error hath happened, to the great damage of the said defendant, Dan K. Swearingen, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington, District of Columbia, and filed in the office of the clerk of the Supreme Court of the United States, on or before the 12th day of March, 1895, to the end that, the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 1st day of March, in the year of our Lord one thousand eight hundred and ninety-five.

Issued at office, in the city of Fort Scott, with the seal of the district court of the United States for the third division of the judicial district of Kansas, dated as aforesaid.

{ Seal of District Court U. S., District of Kansas, Third Division, 1892. }

GEO. F. SHARITT,
Clerk District Court United States, Third Division of the Judicial District of Kansas,
By S. P. MOSHER, *Dep. Clerk.*

Allowed by—
JNO. A. WILLIAMS, *Judge.*

37 [Endorsed:] No. 66. United States district court, third division of the judicial district of Kansas. United States *vs.* Dan K. Swearingen. Writ of error to the district court of the United States for the third division of the judicial district of Kansas. Filed 7th day of March, 1895. Geo. F. Sharitt, clerk, by S. P. Mosher, dep.

Return to Writ.

UNITED STATES OF AMERICA, }
Third Division of the Judicial District of Kansas, } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said district court, at office, in the city of Fort Scott, Kansas, this 7th day of March, A. D. 1895.

{ Seal of District Court U. S., District of Kansas, Third Division, 1892. }

GEO. F. SHARITT,
Clerk of said Court,
By S. P. MOSHER, *Dep. Clerk.*

38 THE UNITED STATES OF AMERICA:

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear in the United States Supreme Court, at the city of Washington, District of Columbia, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the third division of the judicial district of Kansas, wherein Dan K. Swearingen is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable John A. Williams, judge of the district court of the United States for the district of Kansas, third division, this first day of March, in the year of our Lord one thousand eight hundred and ninety-five.

JNO. A. WILLIAMS,
United States District Judge for the District of Kansas.

Service of the above citation is admitted this 1st day of March, A. D. 1895.

W. C. PERRY,
U. S. Att'y, Dist. of Kans.

39 [Endorsed:] No. 66. United States district court, third division of the judicial district of Kansas. United States *vs.* Dan K. Swearingen. Citation. Filed March 7th, 1895. Geo. F. Sharitt, clerk, by S. P. Mosher, dep.

Endorsed on cover: Case No. 15,840. Kansas D. C. U. S. Term No., 567. Dan K. Swearingen, plaintiff in error, *vs.* The United States. Filed March 22nd, 1895.

Office Supreme Court U. S.
FILED.
OCT 11 1895
JAMES H. McKENNEY,
CLERK.

CASE No. 15804.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

DAN K. SWEARINGEN, PLAINTIFF IN error,
v.
THE UNITED STATES.
} No. 567.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1895.

DAN K. SWEARINGEN, PLAINTIFF IN error,
v.
THE UNITED STATES. } No. 567.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR DEFENDANT IN ERROR.

This was a prosecution under § 3893 of the Revised Statutes, as amended by the act of September 26, 1888, ch. 1039, for circulating an obscene publication of an indecent character. The case was tried before Judge Williams and a jury, and the prisoner convicted January 12, 1895, and sentenced to one year's imprisonment at hard labor in the penitentiary, with a fine of $50 and costs.

STATEMENT OF FACTS.

The statute is as follows:

> Every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publica-

> tion of an indecent character * * * are hereby declared to be non-mailable matter * * *; and any person who shall knowingly deposit or cause to be deposited for mailing or delivery anything declared by this section to be non-mailable matter, * * * shall for each and every offense be fined upon conviction thereof not more than $5,000, or imprisoned at hard labor not more than five years, or both, at the discretion of the court.

The publication complained of is printed at page 4 of the record. It was a clipping from a certain newspaper published by defendant at Burlington, Kans. The indictment contained three counts, and charged defendant with mailing copies of this paper to B. Riggs, H. E. Cowgill, and J. M. Lane, respectively, each at Burlington.

The defendant in open court admitted on the trial that he was the editor and publisher of said newspaper (p. 10). It appeared that defendant and two of his printers attended to mailing the newspapers, and there was evidence tending to show that this issue "was mailed the same as other issues" (p. 11). Riggs and Cowgill were regular subscribers to the paper, whose names were on the mailing list, and it was fully proved that Riggs received the copy through the mail (p. 12). The mailing to Cowgill was not proved except as aforesaid, and the witness admitted the possibility that he might have called for his paper at the office instead of getting it through the mail (p. 12). Lane was not a subscriber, but was a member of the firm of Lane & Kent, which was a subscriber. Lane himself, as a member of that firm, received the paper. It was brought to him by the office boy along with other mail, but it did not appear whether the office

boy found it in the mail or had gone to the printing office and got it (pp. 12, 13). The personal responsibility of defendant for this particular article was fully shown (p. 12).

ARGUMENT.

We take up the assignments of error *seriatim*.

I, II. A motion to quash is not subject to review upon writ of error. (*United States* v. *Rosenburgh*, 7 Wall., 580, 583; *United States* v. *Hamilton*, 109 U. S., 63; *Logan* v. *United States*, 144 U. S., 263, 282.)

III. This assignment of error is not based upon any exception.

IV. This brings up the exception to the admission of the newspaper article in evidence. The objection upon which this exception was based was as follows (p. 10):

> Defendant objected for the reason that no public offense was stated in the indictment, and that there was a misjoinder of offense therein, and that the words of said newspaper article did not constitute unmailable matter.

Each count of the indictment charged that defendant, within the jurisdiction of the court, "unlawfully and knowingly, a certain publication * * * containing an article of an obscene, lewd, and lascivious nature, did deposit for mailing and delivery to ——— at Burlington, Kansas; which * * * was by the said Dan K. Swearingen knowingly deposited at the post-office of the United States at Burlington * * * to be conveyed by mail and by the use of said post-office and its officers to said ———." Each count, furthermore, identifies

the article by the name of the newspaper, the number and date of the issue, the page and line upon which the article complained of commences, and the opening and closing words of said article, explaining that "said obscene, lewd, and lascivious article, so contained in said publication as aforesaid, is of a nature so obscene, lewd, and lascivious as to dispense with the incorporation of the words and figures in this indictment." (See *Grimm* v. *United States*, 156 U. S., 604, 608; *Commonwealth* v. *McCance* (Mass.), 41 N. E. Rep., 133.)

The objections to the indictment appear to be disposed of by Rev. St., § 1025, *Potter* v. *United States*, 155 U. S., 438, 444, and *Dunbar* v. *United States*, 156 U. S., 185, 192–194. The point that it does not separately allege the article to have been of indecent character would come with better grace from one who did not at the same time insist that to be obscene is to be indecent and something beyond also.

A more important question arises upon defendant's claim that the newspaper article does not offend against the provisions of the statute. This statute (Supp., p. 621) prohibits sending through the mails an envelope, outside cover or wrapper, or postal card upon which appears any "indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening" matter. The contents of the envelope, cover or wrapper, however, do not offend against the statute unless they are "obscene, lewd, *or* lascivious," and "of an indecent character."

There can be no doubt that this publication is as "scurrilous" as anything recorded in history. Defendant, a Populist editor, refers to a Democratic fellow-editor

as a "red-headed mental and physical bastard that flings filth under another man's name;" "a liar, perjurer, and slanderer, who would sell a mother's honor with less hesitancy and for much less silver than Judas betrayed the Saviour, and who would pimp and fatten on a sister's shame with as much unction as a buzzard gluts in carrion;" as "the companion of negro strumpets;" as "lower, meaner, filthier, rottener than the rottenest strumpet that prowls the streets by night," and as "a pimp that any man can buy for $1 or less."

Being scurrilous is not enough, however, to bring it within the Federal criminal legislation. Plaintiff in error urges that it was not obscene, lewd, lascivious, or indecent. It may be conceded that it was not lewd or lascivious. It is, however, pretty decidedly indecent. But indecency alone is not enough. It must be not only indecent, but also "obscene."

Defendant submits a number of cases in the lower courts which substantially hold that the word "obscene" is synonymous with the words "lewd or lascivious," and which therefore would exclude the present publication. It is respectfully submitted, however, that the former word must be somewhat different in signification from the others in the present statute. The three adjectives are stated disjunctively, as if each had its separate definition, and each should be given separate effect if possible (*Market Co.* v. *Hoffman*, 101 U. S., 112, 115–6).

A wider definition of the word "obscene" is indicated in *United States* v. *Martin* (50 Fed. Rep., 918, 921), and *United States* v. *Loftis* (8 Sawy., 194, 196).

Anderson's Law Dictionary says, on authority of the case last cited, that the word includes what is foul or indecent, *and* what is immodest or calculated to excite impure desires.

It is submitted that there is strong reason for reading the word in this statute in one of the following senses:

> 2. Offensive; disgusting. (Johnson's Dictionary.)
>
> 2. Offensive to the senses; repulsive; disgusting; foul; filthy. (Century Dictionary.)
>
> 1. Offensive to chastity or modesty; expressing or presenting to the mind or view something which delicacy, purity, and decency forbid to be exposed; impure. (Webster, ed. 1890.)
>
> 2. Foul; filthy; disgusting. (*Ibid.*)

V. This assignment of error seems intended to bring up two different motions, as follows (pp. 13, 14):

> Defendant here moved to strike out the evidence of J. M. Lane, and all evidence with reference to the mailing of any paper to J. M. Lane or to H. E. Cowgill. * * *
>
> The defendant offered no evidence whatever, but moved the court * * * to strike out all evidence as to the mailing of any paper to H. E. Cowgill or J. M. Lane.

Both of these motions were denied, and defendant excepted. The first motion was made during the plaintiff's testimony (not immediately after Lane's evidence), and the second after both sides had rested.

It will be noticed that neither motion states any grounds. (See *District of Columbia* v. *Woodbury*, 136 U. S., 450, 462; *Boston and Albany R. R. Co.* v. *O'Reilly*, 158 U. S., 334.)

The motion to strike out Lane's evidence seems to have been intended to raise a question of variance. The indictment stated that the paper was mailed to "J. M. Lane." The proof was that it was mailed to J. M. Lane and ——— Kent, as partners, under the firm name of Lane & Kent (whose names were actually on the subscription list).

The other motion seems to been have intended to raise the point that the evidence was insufficient to go to the jury as to either Lane or Cowgill.

It will be noticed that defendant made no request for special instructions to the jury as to either of these two counts in the indictment.

It is respectfully submitted that defendant's motions to strike out evidence were addressed to the discretion of the court, and that error, therefore, does not lie to their refusal; for if testimony offered is incompetent, or is subject to objection for variance from the pleading or indictment, objection must be promptly taken. (1 Bishop Crim. Proc., § 966 *b*.) When the testimony is once on record the objections on these grounds are waived, although the court in its discretion in a proper case may strike the testimony out. If the testimony is irrelevant, or if, being relevant, it is insufficient to take the case to the jury, the other party has a clear and full remedy, namely, by demanding that the court instruct the jury to this effect. The trial court sometimes strikes out evidence in the former case, but the motion on a jury trial is rather illogical. The jury do not act upon stenographers' minutes, but

upon their recollection of the testimony; and no ruling of the court can strike this recollection out of their heads. (1 Thompson on Trials, §§ 715, 716; *Pontius* v. *People*, 82 N. Y., 339, 347; *Gilmore* v. *Pittsburg R. R. Co.*, 104 Pa. St., 275, 281–2; *McFarland* v. *Bellows*, 49 Mo., 311; *People* v. *Long*, 43 Cal., 444; *Brockett* v. *New Jersey Steamboat Co.*, 18 Fed. Rep., 156; *Wilcox* v. *Stephenson*, 30 Fla., 377, 386; *Gurley* v. *Park*, 135 Ind., 440; *Mo. Pac. Ry. Co.* v. *Lamothe*, 76 Tex., 219, 223; *Little Klamath Co.* v. *Ream*, 39 Pac. Rep., 998.)

There is, indeed, one case in which a motion to strike out evidence is matter of right, but this depends upon an altogether different principle. When evidence is admitted upon a promise thereafter to connect it with the case, and the party offering the testimony fails to carry out his promise, the other party may have it stricken out. This is because its admission was obtained by imposition on the court.

It was indeed remarked in *Benson* v. *United States* (146 U. S., 325, 333), that a motion to strike out incompetent testimony is a matter of right; but this remark was *obiter*, and we respectfully submit that the cases above cited state the true rule, nor is any of the testimony claimed to be incompetent in this case.

It is unnecessary, therefore, to discuss whether the slight variance as to Lane (not specifically pointed out by defendant) is fatal after verdict; or whether there is sufficient evidence to go to the jury as to Lane and Cowgill.

VI. The motion to compel an election by the district attorney was addressed to the discretion of the court.

VII. This assignment of error endeavors to bring up a question which, if properly before the court, would be the most interesting question in this case; so interesting, in fact, that it would be a matter of regret that it should come up for decision in a case which can not be orally argued.

There is, however, but a single exception to the whole of the charge, which charge is as follows (p. 14):

> Gentlemen of the jury, the newspaper article in evidence here, which the defendant admits he published, is obscene and unmailable matter, and the only thing for you to pass upon is whether the evidence satisfies you beyond a reasonable doubt that the defendant deposited, or caused to be deposited, in the post-office at Burlington, Kans., one or more copies of the newspaper containing this article, as charged in the indictment. The question of time is of no importance, except that it was done within three years of the finding of this indictment, which was in November, 1894. If you do so find, then the defendant would be guilty. A reasonable doubt is not a mere suppositious doubt, but one based upon the evidence, and such as a reasonable man would act upon in the most important affairs of life. You are the exclusive judges of the evidence, and of the credibility of all the witnesses and evidence.

It will be noticed that the last three propositions in the charge are of undoubted correctness. While, perhaps, in a capital case the court would overlook this and supply by intendment the specific exceptions which counsel failed on the trial to take, it is submitted that upon a trial for

a mere misdemeanor the rules of practice established for reasons of plain public policy must be maintained. This appears to be fully established by *Allis* v. *United States* (155 U. S., 117, 122–3).

The passage which plaintiff in error now seeks to question is the following:

> The newspaper article in evidence here, which the defendant admits he published, *is obscene and unmailable matter*, and the only thing for you to pass upon is whether the evidence satisfies you beyond a reasonable doubt that the defendant deposited, etc.

It may be suggested that this charge fails to submit to the jury the question of intent; that it might be literally construed as authorizing a conviction even if defendant had no knowledge that his newspaper contained an objectionable article. In the absence of a request for instructions, however, defendant could not except to any omission in the charge. (*Texas & Pacific Ry.* v *Volk*, 151 U. S., 73, 78; *Hickory* v. *United States*, 151 U. S., 303, 316–7.) The bill of exceptions clearly indicates that no question as to defendant's personal responsibility for the inclusion of this article in his newspaper was in the minds of court or jury. The situation was similar to that in the famous English libel cases of the last century, where it was tacitly assumed that "publication of course meant an intentional publication." (2 Stephen's History of the Criminal Law of England, p. 355.) The mailing referred to by the court was the intentional mailing of a newspaper intentionally including the paragraph in question.

Defendant's objection is evidently an objection to the positiveness of the charge with relation to the obscenity and unmailability of the article. The court rules it obscene and unmailable as matter of law, and charges the jury accordingly. Defendant claims that the character of the article is a question not of law, but of fact, and should have been submitted to the jury.

It should be borne in mind that there is no ambiguity or doubt whatever as to the meaning, character, and import of this article. None could be clearer or less mistakable. Whatever ambiguity exists is contained not in the article, but in the statute. The question to be settled was the meaning of the English word "obscene" as used in the act of 1888. The ordinary meaning of words in the English language as used in a statute is a matter of which the courts ordinarily take judicial notice. It is regarded as a question of law. (*Marvel* v. *Merritt*, 116 U. S., 11; *Nix* v. *Hedden*, 149 U. S., 304; *Saltonstall* v. *Wiebusch*, 156 U. S., 601.)

Does this rule apply in a criminal case? Is the meaning, character, and import of a statute, or of a written document, a question of fact for the jury in a criminal case, although it is a question of law for the court in a civil case?

Judge Thayer ruled in support of defendant's contention in *United States* v. *Clarke* (38 Fed. Rep., 500). This decision is based upon certain English decisions in libel cases, which will be considered hereinafter.

Two opinions in the State courts are to the contrary.

In *McNair* v. *People* (89 Ill., 441) Judge Walker says (although *obiter*):

> A majority of the court are of opinion * * * that whether obscene or not is a question of law and not of fact; that the question is for the court to determine, and not for the jury.

In *Smith* v. *State* (24 Tex. App., 1) the court say:

> The composition being a written one, it was the province of the court to construe it and determine whether or not it was indecent and obscene. In construing it to be indecent and obscene, and in so instructing the jury, we think there was no error.

In criticising Judge Thayer's decision we respectfully submit the following propositions: First, that the construction of a written instrument is always a question of law for the court, especially when its language is unambiguous, excepting, of course, when some matter of fact, such as the existence of a usage governing the language of the document, is first to be settled; second, that even in a criminal case it is the duty of the jury to take the direction of the court upon questions of law; third, that the English libel cases relied upon by Judge Thayer are, if they correctly state the law, distinguishable as based upon considerations applying peculiarly to the law of libel and not applicable to the issue of decency.

(*a*) It is unnecessary to multiply authorities holding that the legal effect of a written instrument is a question of law to be decided by the court. (*Hamilton* v. *Liverpool Ins. Co.*, 136 U. S., 242, 255.) If this instrument were, for instance, a contract claimed to be void as offending public morality, that question would be settled by the court.

(*b*) In a criminal as in a civil case the jury is morally bound to follow the direction of the court upon a question of law, and it is the court's duty to instruct the jury accordingly.

This proposition has received various applications. For instance, it is for the court to decide, when the facts are conceded, upon a plea of former jeopardy. (*Thompson* v. *United States*, 155 U. S., 271, 273, 274.) In a perjury case it is for the court to decide whether the false evidence was material to the issue in support of which it had been presented. (*Gordon* v. *State*, 48 N. J. Law, 611; *Cothran* v. *State*, 39 Miss., 541.) It may be questioned if the existence of foreign law, if once proved by competent evidence, is not a question for the court to decide.

This principle has been applied to written instruments. Thus in a criminal case it has been held that a certain scheme contained in a written document was an illegal lottery. (*Commonwealth* v. *Sullivan*, 146 Mass., 142.)

It seems unnecessary, however, to multiply authority, since the question has recently been decided by this court in the case of *Sparf* v. *United States* (156 U. S., 51), in which case it was held proper to direct the jury that they could not find the prisoner guilty of manslaughter, but must find him guilty of murder or acquit. Among the famous passages quoted with approval by the court from former jurists of distinction we may refer to the following:

From Mr. Justice Thompson (p. 72):

> I have repeatedly ruled on the trial of criminal cases that it was the *right* as well as the duty of the

court to decide questions of law; and any other rule, it appears to me, would be at war with our whole judicial system, and introduce the utmost confusion in criminal trials. It is true, the jury may disregard the instructions of the court, and in some cases there may be no remedy. But it is still the right of the court to instruct the jury on the law, and the duty of the jury to obey the instructions.

From Mr. Justice Curtis (pp. 75, 76):

In my opinion, it is the duty of the court to decide every question of law which arises in a criminal trial; if the question touches any matter affecting the course of the trial, such as the competency of a witness, the admissibility of evidence, and the like, the jury receive no direction concerning it; it affects the materials out of which they are to form their verdict, but they have no more concern with it than they would have had if the question had arisen in some other trial. If the question of law enters into the issue and forms part of it, the jury are to be told what the law is, and they are bound to consider that they are told truly; that law they apply to the facts as they find them, and thus, passing both on the law and the fact, they, from both, frame their general verdict of guilty or not guilty. Such is my view of the respective duties of the different parts of this tribunal in the trial of criminal cases, and I have not found a single decision of any court in England prior to the formation of the Constitution which conflicts with it.

From Mr. Justice Field (pp. 78, 79):

It is the province of the court, and of the court alone, to determine all questions of law arising in the progress of a trial; and it is the province of the jury to pass upon the evidence and determine all contested questions of fact. The responsibility

of deciding correctly as to the law rests solely with the court, and the responsibility of finding correctly the facts rests solely with the jury.

From Chief Justice Shaw (p. 81):

> If I am right in the assumption that the judge is to adjudge the law and the jury the fact only, it furnishes the answer to this question, to what extent the jury adjudicate the law, and it is, that they receive authoritative directions from the court, and act in conformity with them, though by their verdict they thus embrace the law with the fact, which they may rightfully adjudicate.

From Judge Selden, of the court of appeals of New York (p. 83):

> The unquestionable power of juries to find general verdicts, involving both law and fact, furnishes the foundation for the opinion that they are judges of the law as well as of the facts, and gives some plausibility to that opinion. They are not, however, compelled to decide legal questions, having the right to find special verdicts, giving the facts, and leaving the legal conclusions which result from such facts to the court. When they find general verdicts I think it is their duty to be governed by the instructions of the court as to all legal questions involved in such verdicts. They have the power to do otherwise, but the exercise of such power can not be regarded as rightful, although the law has provided no means, in criminal cases, of reviewing their decisions whether of law or fact, or of ascertaining the grounds upon which their verdicts are based.

Mr. Justice Hunt, sitting at circuit, did once go so far as to direct a verdict of guilty in a criminal case. (*United States* v. *Anthony*, 11 Blatchf., 200.) This was a prosecution against Susan B. Anthony for illegal voting. She

admitted all the facts, so that the plain duty of the jury was to find a verdict of guilty. This case has been generally disapproved on the ground that a verdict of guilty could not be absolutely directed from the bench. Under the Sparf case, however, Mr. Justice Hunt was clearly entitled and required to inform the jury that, while he could not relieve them of the responsibility of finding a verdict, nevertheless it was their duty to find it against the prisoner upon the facts thus admitted.

(*c*) The English libel cases relied upon by Judge Thayer are not in point. They are opposed to other very weighty authorities, and if sustainable are sustainable upon a point not applicable to cases arising under this statute.

The proposition upon which these English cases are cited is that Mr. Fox's Libel Act of 1792 was really a declaratory act. The cases are cited to this effect not only by Judge Thayer, but by this court in its opinion in *Sparf* v. *United States*, 156 U. S., at pages 97–8, following in this respect the views of Mr. Justice Curtis in the Morris case quoted by this court at 156 U. S., 78. It is to be borne in mind that the comments thus cited from the Sparf case were not necessary to the decision of the question then before the court. They are referred to *arguendo*, but it was not necessary to decide that the court could not direct the action of the jury in passing upon the construction of a document. The conflict of authorities with reference to the character of Mr. Fox's act does not seem to have been brought to the attention of the court. Indeed, the decision in the Sparf case was

altogether without the assistance of counsel upon the points decided, which were raised after the submission of the case by the court itself. Under these circumstances it is proper to discuss the question *de novo*. (*United States* v. *Sanges*, 144 U. S., 310, 319; *Cross* v. *Burke*, 146 U. S., 82, 87; *Snow* v. *United States*, 118 U. S., 346, 354; *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S., 429, 574–5, 579.)

If the English cases holding that Mr. Fox's Libel Act was declaratory are to be regarded as authority, the reasoning upon which this conclusion is based must be noted. A leading case is *Parmiter* v. *Coupland* (6 M. & W., 104). It will be noticed that this was a civil case, and that the question was not whether the right of the jury to construe the document in question was deducible from general principles of *criminal law*, but whether it was deducible from general principles of *the law of libel*. Parke, B., as quoted by Mr. Justice Harlan at 156 U. S., 97, said in part:

> A publication, without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, is a libel. Whether the particular publication, the subject of inquiry, is of that character, and would be likely to produce that effect, is a question upon which a jury is to exercise their judgment and pronounce their opinion, *as a question of fact*.

Alderson, B., says (6 M. & W., 109):

> The same thing might be no libel on me which might be a very grievous and injurious libel on another.

It will thus be noticed that the Parmiter case, which is the leading case and main basis of the theory adopted by Judge Thayer, turns largely upon the point that an alleged libel is not a document whose meaning can be ascertained solely from its face, but that to properly judge of its legal effect it is necessary to be assisted by information as to outside facts. In other words, upon the theory of the learned judges in this case, its principle is very similar to that of the familiar cases in which a jury has been called in to decide upon the meaning of a contract or statute, because that meaning is dependent upon testimony as to commercial usage—the testimony being left to the consideration of the jury in all cases, because it involves matters of opinion.

In Alexander Hamilton's famous argument on the law of criminal libel, referred to in the dissenting opinion in the Sparf case, a point was taken which is not applicable to a prosecution under the present statute (*People* v. *Croswell*, 3 Johns. Cas., 337, 345):

> The particular intent constitutes the crime in cases of libel, because the act is not of itself unlawful; and where the particular intent alone constitutes the guilt the court can not judge of that intent, and the jury must find it. The time and circumstances are very material in cases of libel.

Even Lord Erskine's famous propositions, submitted to the court in the Dean of St. Asaph's Case, did not go to the extent of holding that the court in no criminal case could charge the jury that they were bound to follow its instructions as to the legal effect of a document. His

second proposition is "that no act which the law *in its general theory* holds to be criminal constitutes in itself a crime abstracted from the mischievous intention of the actor;" and he proceeds to say that the mischievous intention is "to be collected by the jury with the judge's assistance" when it is "a simple inference of reason from the fact or facts established," and that it is "a pure unmixed question of fact for the consideration of the jury" when it "can not be collected by simple inference from the fact charged." (2 Stephen's History of the Criminal Law of England, pp. 334–5.) It will be noticed that this carefully guarded language avoids dealing with questions growing out of statutory *mala prohibita*.

It is submitted that the Federal legislation against the mailing of obscene publications establishes a *malum prohibitum* in which mischievous intent constitutes no element. The words of any publication brought before the court under this statute are or are not within its terms according as the intrinsic evidence of the document shows. (*United States* v. *Harmon*, 45 Fed. Rep., 414, and cas. cit.) The object of the statute is "to purge the mails of obscene and indecent matter, as far as is consistent with the rights reserved to the people and with a due regard to the security of private correspondence from examination." (*United States* v. *Chase*, 135 U. S., 255, 261.) This being the object in view, the intent of the writer is as immaterial as is the intent of a defendant Mormon in a prosecution under the Edmunds Act. (*Reynolds* v. *United States*, 98 U. S., 145–147.)

There is a conflict of authorities in this country as to whether Mr. Fox's Libel Act was declaratory. (Bigelow's

Odgers' Libel and Slander, 94, note *a*; see also *Gottbehuet* v. *Hubachek*, 36 Wis., 515; *Estham* v. *Curd*, 15 B. Mon., 102; *Dunnell* v. *Fiske*, 11 Met., 551; *State* v. *Brady*, 44 Kans., 435.)

The English cases were reviewed in 1870 by Judge Sharswood in *Pittock* v. *O'Niell* (63 Pa. St., 253). This was a civil case and the question before the court was whether the trial judge had a right to instruct the jury as to the document in question that "there can be no doubt that it is libelous and grossly so." The English cases are disapproved, and the declaratory effect of Mr. Fox's Libel Act is stated to be "merely to restore to the jurors their common-law right to give a general verdict in cases of libel just as in other criminal cases, of which they had been unconstitutionally deprived."

The New York court of appeals held to the same effect in *Hunt* v. *Bennett* (19 N. Y., 173), a case argued by David Dudley Field and Nicholas Hill for the respective parties.

In *State* v. *Goold* (62 Me., 509, 511), upon an indictment for libel, Walton, J., states the law as follows:

> In fact, in all criminal trials a general verdict of guilty affirms not only that the defendant committed the act in question, but also that the act was one prohibited by law; and to this extent such a verdict does in every case determine the law as well as the fact. But *the difference between indictments for libels and other criminal prosecutions is this*, that in the former the jury may rightfully pass upon the criminality of the act, although their judgment in that respect is contrary to the opinion of the court, *while in the latter they have no such right.* In the latter, as in the former, they do in fact pass upon the law as

> well as the facts involved in the issue; but in the former the Constitution secures to them the right to determine the law for themselves, while *in the latter it is their duty to follow the instructions of the court.*

To these decisions holding that, so far as it prevented the court from charging the jury as to the construction of a document claimed to be libelous, Mr. Fox's Libel Act was not declaratory, but in derogation of the common law, is to be added the high authority of Mr. Justice Stephen, who says (2 Stephen's History, pp. 347, 348):

> The libel act is no doubt on its face declaratory, but I look upon this simply as a statement put in the mouth of Parliament by draftsmen who used that form of expression as a way of saying that the law which the courts had in fact made ought to have been made otherwise than it was.

This distinguished author, in his interesting chapter on seditious offenses, seditious words, libels, and conspiracies (2 Stephen's History, pp. 298–395), discusses the various leading cases at great length, and maintains in general the correctness of the opinion of the judges of England, which opinion was overruled by Mr. Fox's act. He says (pp. 350, 351):

> In their answers to the questions put to them by the House of Lords the judges said, I think unanswerably, that the criminality of any act whatever is, and from the nature of the case must be, the result of the judgment of the law upon a state of facts. Hence, questions of law being for the judge, and questions of fact for the jury, the judge's duty must be to tell the jury what judgment the law would pass upon a given state of facts suggested to the jury, supposing them to find its existence. * * * "If A killed B under such and such cir-

> cumstances, did A murder B?" "If A, intending to deprive B permanently of his horse and to appropriate it to himself fraudulently and without claim of right, rode the horse away, did A steal B's horse?" "If A, with intent to steal, broke into B's house at 12 at night, did A commit burglary?" Surely each of these is a question of law and has never been supposed to be anything else. How, then, can the question, whether the publication of particular words is or is not a crime be anything but a question of law?

The learned judge further says (p. 356):

> Assuming the words to be clear in themselves and to be fairly quoted in the indictment or information, it is difficult to see what question of fact there can be as to their meaning. They must speak for themselves.

Lords Thurlow, Bathurst, Kenyon, and others, in their protest against the passage of the act, stated that "the rule laid down by the bill, contrary to the determination of the judges and the unvaried practice of ages, subverts a fundamental and important principle of English jurisprudence, which, leaving to the jury the trial of the fact, reserves to the court the decision of the law." (Quoted by Mr. Justice Gray at 156 U. S., 139.)

It is therefore respectfully submitted that if the article in question be regarded by this court as within the definition of the statute the judgment should be affirmed.

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